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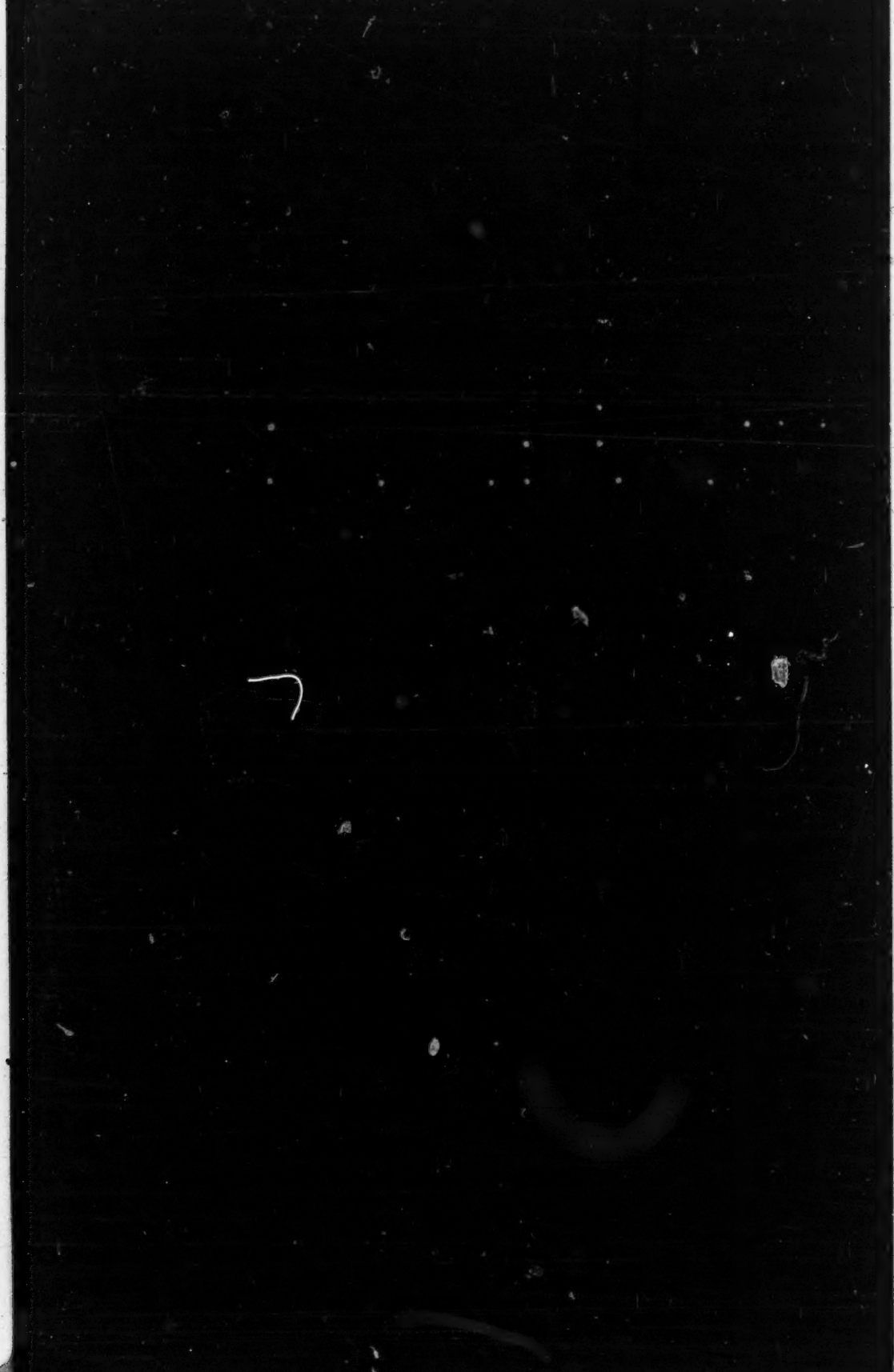

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 594

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; CITY OF KANSAS CITY, KANSAS; DON C. MCCOMBS, FRANCIS BLAKE, AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Missouri upon the issuance of the temporary injunction herein (R. 239–259) is reported in 32 F. Supp. 917. The opinion on final decree (R. 336–340) is reported in 34 F. Supp. 4. The court issued a supplemental opinion on final decree (R. 376–377) which is not yet reported.

JURISDICTION

The final order and decree of the District Court was entered on July 13, 1940 (R. 378) and the order allowing appeal was entered on August 30, 1940 (R. 396). The jurisdiction of this Court is based upon Section 238 of the Judicial Code (c. 229, 43 Stat. 938, 28 U. S. C. § 345) and the Act of February 11, 1903, as amended (c. 544, 32 Stat. 823; c. 428, 36 Stat. 854; c. 231, 36 Stat. 1167; 49 U. S. C. §§ 44, 45), commonly known as the Expediting Act.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, as amended (c. 104, 24 Stat. 379; c. 3591, 34 Stat. 587; c. 91, 41 Stat. 479, 483; 49 U. S. C. §§ 2, 3 (1), 6 (7)) and of the Elkins Act as amended (c. 708, 32 Stat. 847; c. 3591, 34 Stat. 587; c. 231, 36 Stat. 1167; 49 U. S. C. §§ 41–43) appear in the Appendix, *infra* pp 76–80.

QUESTIONS PRESENTED

Union Pacific promoted and, together with the City of Kansas City, Kansas, financed and constructed a produce terminal located on city-owned property. This produce terminal is reached exclusively by Union Pacific lines. The questions are:

1. Whether it is a violation of the prohibition against the giving of concessions, contained in the Interstate Commerce and Elkins Acts, for the Union Pacific and the City to offer and give valu-

able inducements to produce dealers to persuade them to move their place of business from the produce market at Kansas City, Missouri, to the new produce terminal at Kansas City, Kansas, the purpose and necessary effect of such action being to secure the traffic of those dealers for the Union Pacific.

2. If the offer and grant of these inducements are illegal, whether the court below properly framed its decree to prevent future violation of the statutory prohibition.

STATEMENT

PROCEEDINGS BELOW

This suit was brought in the District Court for the Western District of Missouri on December 29, 1939, to enjoin the Union Pacific Railroad Company, the City of Kansas City, Kansas, certain of their officers and agents, and 33 produce dealers from violating the provisions of the Interstate Commerce Act (49 U. S. C., § 1 *et seq.*) and the Elkins Act (49 U. S. C., §§ 41–45), which prohibit rebates, concessions, and discriminations in respect to the transportation of property by railroad in interstate commerce. The complaint was filed in the name of the United States by direction of the Attorney General acting at the request of the Interstate Commerce Commission (R. 2–25). On January 3, 1940, the court, on motion of the United States, joined as parties plaintiff The Atchison, Topeka and Santa Fe Railway Company;

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; the Chicago, Burlington and Quincy Railroad Company; and the City of Kansas City, Missouri (R. 93).[1] On January 23, 1940, the Union Pacific Railroad Company (hereinafter referred to as "Union Pacific") filed a motion to vacate the order joining the additional plaintiffs (R. 167–168), but the court denied the motion (R. 184).

Simultaneously with the filing of the complaint a temporary restraining order was entered against all of the defendants (R. 90–93).[2] On January 3, 1940, the order was modified and continued in force until further order of the court (R. 94–97). Thereafter the defendants filed separate answers which, in effect, put in issue all of the charges in the Government's complaint (R. 97–167, 169–184, 184–193).

The case came on for hearing on the application for a temporary injunction on February 12, 1940, and evidence was taken until March 15 (R. 412). On March 25 the court filed its opinion, findings of

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[1] Hereinafter the railroads will be referred to collectively as "appellee carriers."

[2] The Union Pacific and the City of Kansas City, Kansas, and its officers and agents are appellants here. DeOreo, Fean, and the 33 produce dealers who were defendants in the court below have not appealed.

fact, and conclusions of law sustaining the Government's position (R. 239–286). On April 5 the court filed supplemental findings of fact (R. 286–288), and on April 10 entered an order granting a temporary injunction as prayed in the complaint (R. 288–293).

Further evidence was taken on the application for a permanent injunction (R. 412). On July 8 the court filed a short opinion noting that the evidence on the application for a temporary injunction was a part of the record in the final proceedings and that practically no additional evidence had been adduced on the questions previously considered. Accordingly the court indicated that its prior opinion should be taken as covering the issues to which that evidence was pertinent (R. 336–340). On the same day extensive findings of fact and conclusions of law were filed sustaining the prayer for a permanent injunction (R. 340–376). On July 13, 1940, a supplemental opinion was filed denying the Government's request that minimum rentals be fixed for the properties involved (R. 376–377). At the same time a permanent injunction was entered against all of the defendants (R. 378–381).

FINDINGS AND OPINION

The pertinent facts in this controversy are fairly summarized in the court's opinion on temporary injunction (R. 239–259) and its findings of fact on final injunction (R. 340–365), both of which are

fully documented with references to the original record. For the convenience of the Court, the record references inserted by the District Court have been translated into references to the present record, and the opinion and findings have been reprinted with that change in a separate volume filed together with this brief.

Appellants, in their brief, have chosen almost completely to disregard the District Court's findings and opinion and have substituted in their place a narrative statement based upon a fragmentary recital of the evidence. This evidentiary recital may be construed as an oblique attack on the findings of fact as contrary to the evidence, since many of the assertions of fact made during the course of the recital are contrary to the findings. However, only a very few of the evidentiary findings are directly assailed as being without foundation in the record; the validity of the great majority is not directly attacked and must, therefore, be deemed admitted. Because of this, and particularly because the District Court so fully annotated its findings and opinion by references to the record, we shall rely for the succeeding statement of the case solely upon the opinion and findings, except in a few instances where, in the interests of completeness, we have supplemented them by recourse to undisputed evidence. Insofar as reliance is placed on those few findings which appear to be directly challenged by appellents' brief, we have so indicated and have briefly set out the evidence supporting those findings.

The background.—Kansas City, Missouri, and Kansas City, Kansas, are part of a district known as Greater Kansas City. For eighty years there has been a produce district in Kansas City, Missouri, serving the needs of Greater Kansas City, in which various produce dealers, including defendant dealers, have been engaged in the wholesale sale and distribution of perishable food products (Fdg. 7, R. 342). The business of the dealers has been almost exclusively the purchase and sale of produce transported in interstate commerce by competing railroads, including the Union Pacific and appellee carriers (Fdgs. 7, 21, 22, 29, R. 342, 354, 358).

In December 1936, defendants DeOreo and Fean, who for a number of years had been engaged in promoting terminals with wholesale produce markets and rail facilities in various cities, approached the traffic representative of the Union Pacific at Cleveland, Ohio, and suggested the promotion of a perishable food terminal on the line of the Union Pacific at Kansas City (Fdg. 9, R. 343; Op., R. 242). They were referred to an executive of the Union Pacific at Kansas City (Op., R. 242). In January 1937 Fean and DeOreo went to Kansas City (Fdg. 9, R. 343). Representatives of the Union Pacific demonstrated much interest in the establishment of the proposed market and showed DeOreo and Fean various prospective sites. In the judgment of an executive of the Union Pacific, the

most suitable site was on the Public Levee owned by the City of Kansas City, Kansas, and that site, which was served by the Union Pacific, was selected. (Fdg. 9, R. 343; Op., R. 242.)[3]

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[3] The evidence shows that the Union Pacific threw a cloak of secrecy about the movements of defendants DeOreo and Fean and the plans for the project. On January 6, 1937, Mr. Guy E. Stanley, Executive Assistant to the President of the Union Pacific, wrote to Mr. J. L. Haugh, Executive Vice President, stating "These people are registered at Hotel Muehlebach. Apparently no one but us know what they have in mind * * *" (Ex. 2, R. 1496). With the exception of appellant Don C. McCombs, Mayor of Kansas City, Kansas, none of the city commissioners was advised respecting plans for the food terminal until May 1937, despite the fact that Fean and DeOreo arrived in Kansas City in the early part of January of that year. At that time appellant McCombs furnished the other city commissioners with the first information respecting pending plans for the establishment of the food terminal on the Public Levee (Ex. 2, R. 1517). On June 24, 1937, the matter was first submitted to the Board of Commissioners of the City of Kansas City, Kansas, acting in its official capacity (Ex. 62A, pp. 1–4; R. 2481–2483). However, on February 4, 1937, Mr. C. C. Weedin, General Freight and Passenger Agent of the Union Pacific at Kansas City, advised Mr. R. R. Mitchell, Freight Traffic Manager, "Naturally, it will be promoted as a civic program" (Ex. 13, p. 5; R. 1791). In a letter addressed to Mr. W. M. Jeffers, President of the Union Pacific, on January 27, 1938, Mr. J. L. Haugh, Executive Vice President, stated (Ex. 4, p. 15; R. 1564–1565):

"This market is to be built, owned and operated by the city, and accordingly the city will have to front for it, and it will require their unanimous support. They do not have the time, the information or the routine for handling the multitudinous details that are required to get the thing set up and contracts let. Mr. Stanley and I will have to do this for them subject to their concurrence and approval."

Officials of the Union Pacific investigated the financial standing and reputation of DeOreo and Fean (Op., R. 242). They also formulated tentative financing plans, obtained plans of other markets, and considered general plans for the particular market (Op., R. 242–243). It was contemplated that the terminal should be financed through appellant Kansas City, Kansas (hereinafter referred to as "the City"), and the Public Works Administration, and that the market buildings should be owned by the City in order that a grant of Public Works Administration funds might be obtained (Fdg. 10, R. 343). A further purpose of having the City own the market buildings was to free the terminal from taxation so that space might be rented to produce dealers at low rentals and thus give them an advantage over other shippers less fortunately situated (Fdg. 10, R. 343–344). The Union Pacific also contemplated avoiding, in so far as possible, the necessity of sharing with competing carriers the traffic moving to and from the terminal (Fdg. 32, R. 359).

The promotion and construction of the new terminal.—The Union Pacific negotiated with and succeeded in interesting the City and its officials in the scheme (Fdg. 11, R. 344). Thereafter, in every phase of promoting and financing the venture, it participated jointly with the City and took a leading and dominant part. It procured plans and estimates from engineers and

originated the idea of financing the terminal in part by a grant from the Public Works Administration and in part by the issuance of City revenue bonds. (Fdgs. 11, 12, R. 344.) In furtherance of the financing scheme, Union Pacific officials conferred with Public Works Administration attorneys relative to the necessity for state legislation, prepared such legislation, and assisted in obtaining its passage by the legislature and its signature by the Governor (Op., R. 243). It advanced funds for numerous trips to Washington by city officials and others in connection with the application for the grant of public moneys (Op., R. 243–244). It collaborated in preparing the application for the grant and furnished data in support thereof (Op., R. 244). When the first application was denied, the Union Pacific determined that the project was feasible even without public funds and continued its promotional activities on that basis. However, the City, with the aid and assistance of Union Pacific, succeeded on October 7, 1938, in securing a P. W. A. grant to cover 45% of the cost of the project (Fdg. 13, R. 346–347).[4]

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[4] On September 6, 1938, Stanley, Executive Assistant to the President of Union Pacific, arrived in Washington with a delegation from Kansas City, Kansas, for the purpose of obtaining approval of the P. W. A. grant (Ex. 6, R. 1621–1625.) On October 8, 1938, in a letter addressed to Stanley at the Mayflower Hotel, Haugh, Executive Vice-President, stated (Ex. 6, R. 1625): "You have done a noble job."

Union Pacific also took the lead in securing private financing. Having aided the City in securing the necessary legislation, it undertook to locate a purchaser for $3,000,000 of new revenue bonds proposed to be issued by the City to retire its outstanding public levee revenue bonds and finance the remaining 55% of the cost of the project. In order to persuade the investment banking firm of Stifel, Nicolaus & Company to purchase the bonds, the Union Pacific offered to execute a limited guaranty deemed by it sufficient to meet the carrying charges on the proposed issue over and above rentals that the investment bankers regarded as safely assured. However, after the Public Works Administration grant had been approved on the assurance that the bankers would take the revenue bonds, Union Pacific refused to make a guarantee of income sufficient to meet the fixed charges and the bankers withdrew their offer. Union Pacific then purchased the bonds itself. The bonds are secured solely by the revenues accruing from the terminal and from the rental of other Public Levee property and are not a claim against the general revenues of the City. (Fdg. 13, R. 346–347.)

Jointly with the City, Union Pacific supervised the construction of the terminal. It sought and secured a tenant for the market's cold-storage facilities. (Fdg. 12, R. 345.) At the suggestion of Union Pacific, the City in June 1938 entered into a contract with DeOreo and Fean designating them

as exclusive leasing agents for the terminal.[5] Subsequently, when that contract was cancelled upon the insistence of the Public Works Administration, the Union Pacific reached an agreement with DeOreo and Fean whereby they continued the promotion of the terminal and received $350 each per month from the Kansas City Industrial Land Company, a subsidiary of the Union Pacific. (Fdg. 14, R. 347–348.)[6] Union Pacific also caused a large

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[5] Appellants in their brief (pp. 224–225) assert that there is no evidence that the Union Pacific was a party to negotiating the contract. The record, however, is to the contrary. Stanley, Executive Assistant of the Union Pacific, was present when the subject was first discussed with City officials (R. 636, 1031). Stanley thereafter talked several times with the City Commissioners and the City Attorney about the contract (R. 1063). In a letter addressed to Mr. F. W. Charske, Chairman of the Executive Committee, on February 19, 1938, Mr. W. M. Jeffers, President of Union Pacific, advised that "The city has also agreed to employ Mr. Joseph DeOreo and Mr. William Fean as lease agents" (R. 1569). In a letter addressed to Mr. Jeffers on February 4, 1938, Mr. Haugh stated that he had participated in the selection of the personnel of a committee which would "particularly recommend agents to be employed to secure leases for the market buildings" (R. 2183). When the contract between the City and DeOreo and Fean was cancelled, DeOreo and Fean threatened *to sue the Union Pacific* for services rendered (Fdg. 14, R. 348). Afterwards, DeOreo received $22,500 from the Union Pacific for five months' services at its Denver terminal (Fdg. 14, R. 348–349).

[6] Appellants contend (Br. 58) that the payments to DeOreo and Fean merely represent a conditional loan to be repaid if and when they receive settlement from the City. However, the vouchers received by DeOreo and Fean are all marked "For services performed" (R. 1705, 1746, 2115, 2316, 2318A, 2321, 2322); the amount is not considered re-

number of its officers, employees and agents, and the officers, employees and agents of its subsidiary, Kansas City Industrial Land Company, and of its corporate affiliate, the Pacific Fruit Express Company, to render services in connection with the promotion, leasing, and financing of the terminal for considerable portions of time during the years 1937, 1938, and 1939. In addition, Union Pacific advanced large sums of money to the City to finance the preliminary expenses of the terminal project, no part of which has been repaid. (Fdg. 12, R. 346.)

The terminal facilities.—The new terminal, which was opened for business on December 4, 1939, is a unitary enterprise consisting of produce buildings, a cold-storage plant, farmers' market, etc., and railroad yards, tracks and other equipment serving the market. (Fdgs. 8, 17, R. 342, 350.) The terminal is designed for handling transcontinental carload shipments of fresh fruits and vegetables, such shipments being either purchased for local distribution or diverted to other markets. Inspection facilities are furnished to the dealers. (Op., R. 245.)

The railroad facilities consist of a team track and inspection yard owned by the Union Pacific

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collectible by the Union Pacific (R. 447); and the City is prohibited from making payments to DeOreo and Fean by reason of the conditions contained in the P. W. A. grant (R. 2577).

and certain so-called "house tracks" serving the produce buildings owned by the City (Fdg. 8, R. 342–343). The City operates and manages the produce market and all facilities other than rail facilities. The Union Pacific operates the team track and inspection yard and the other rail facilities. (Fdg. 17, R. 350.) With the exception that the Missouri Pacific and the Union Pacific jointly serve the cold-storage plant, the terminal is served and reached only by the tracks of the Union Pacific (Fdg. 15, R. 349). If shipments come to the market by other railroads, the Union Pacific charges $6.60 per car in and $6.60 out on diverted shipments, and $13.20 per car on shipments unloaded at the terminal, these charges being absorbed by the line-haul carriers (Op., R. 245).

The team track and inspection yard was constructed by the Union Pacific at a cost of approximately $603,000. The other parts of the terminal to which legal title is held by the City, namely, the produce buildings, cold storage plant, farmers' market, and house tracks, have been constructed with funds derived as follows: $1,710,000 from the Public Works Administration grant; $1,967,000 from revenue bonds of the City purchased by Union Pacific; and $149,000 from funds derived by the City through the sale of general obligation bonds or taxation and used for street and sewer improvements in the terminal area. (Fdg. 16, R. 349–350.)

The offering and giving of concessions.—It was realized from the outset of the venture that a division of the market between the established Missouri market and the new terminal would be fatal to the success of both (Op., R. 245–246). Union Pacific and other interested parties therefore set about to induce the Missouri dealers to move to the new market. Opposition to the plan was anticipated, so its early developments were carefully clothed with the utmost secrecy. But as the purpose of the proponents of the new market became known and the anticipated opposition developed, the campaign for the enlistment of the Missouri dealers, under the direction of Union Pacific, became open and intense. (Op., R. 245–246.)

Apparently the first step in the plan was the formation of a merchants committee to promote the terminal. DeOreo induced five produce dealers to serve on this committee by agreeing to pay them each $5,000 for services rendered and for occupying the new terminal (Fdg. 19, R. 351–352).[7] Later, as the evidence shows, Union Pacific sponsored and

[7] One of the dealers testified that Stanley, an executive of the Union Pacific, was in constant touch with the merchants committee for two and one-half years and that Stanley told him that "he was going to see that Joe [DeOreo] would pay us" (R. 596–597, 605). Stanley had frequent contact with the committee and took part in its deliberations (R. 1585–1586, 1690–1691, 1696–1697). Mr. Jeffers, President of the Union Pacific, and Mr. Haugh, its Executive Vice President, also attended at least one meeting of the merchants committee (R. 597, 1614).

paid for a trip to other produce terminals in Chicago, Cleveland, Buffalo, and St. Louis given to 15 Missouri produce dealers (R. 1841, 1844, 1852, 1856–1858, 1862, 2243, 582–583, 625, 585).

As the market neared completion, however, it became evident that methods more compelling would be necessary, since the desired and necessary number of Missouri dealers had not been definitely committed to move to the new market (Op., R. 246). Indeed, as early as August 1937 the Union Pacific contemplated the necessity of giving the dealers cash bonuses, or else purchasing unwanted property from them, in order to induce them to move to the new market (Fdg. 19, R. 351). The executives of Union Pacific were not unmindful, however, of the prohibitions of the Elkins Act (Op., R. 246–247). Accordingly, they conceived the idea that the concessions should be given in the name of the City, and obtained an opinion from Union Pacific's legal department to the effect that payments thus made would not violate the Act (Op., R. 246–247). They obtained this opinion and actually began negotiating with the produce dealers with respect to the concessions before the City was even apprised that the dealers would have to be paid to move (Op., R. 246–247; Fdg. 19, R. 351–352).

The next step was to secure the acquiescence of the City. There was some doubt, however, as to

public approval of the contemplated payments and as to their legality under state law (Op., R. 248). Public approval was obtained by referring the question to a citizens committee (Op., R. 248). A Union Pacific official wrote that he attended the meeting and urged upon the committee the necessity and importance of making the payments (R. 1780). The legality of the payments under Kansas law was determined by friendly *quo warranto* proceedings brought in the State Supreme Court, which were at least partially directed by Union Pacific (Op. R. 248; see p. 22, *infra*). The opinions of the Supreme Court in those proceedings are reported sub nom. *State ex rel. Parker* v. *Kansas City,* 151 Kans. 1, and 151 Kans. 2.

Union Pacific initiated and participated in all of the negotiations with the produce dealers, for the most part out of the presence of any official or agent of the City (Fdg. 26, R. 356). Sometimes the negotiations were handled by a Union Pacific executive alone, sometimes by a committee of three of which that executive was one, and sometimes by DeOreo at a time when he was receiving regular monthly advances from the Union Pacific (Fdg. 20, R. 352–353; Op., R. 249). When negotiations resulted in an understanding with a produce dealer, the dealer was told that Union Pacific could not pay him, but that the matter would be submitted to the City (Op., R. 249). Concessions were not

to be given to all Missouri dealers but only to a sufficient number of the more important ones to insure discontinuance of the Missouri market (Op., R. 250).

The concessions thus offered to the produce dealers, to be given in the name of the City, fell into two major categories:

First. Bonuses were to be paid either by outright cash gifts or by credits against future rental obligations under the standard form of lease. The proposed cash payments ranged from $250.00 to $30,500.00 in individual cases, and totaled approximately $111,000 (R. 66). The rental credits varied in amount between dealers, running as high as $9,000 in one case (R. 2174). According to the allegations in the City's answer in the *quo warranto* proceedings, the total amount of proposed rental credits was $30,700, but this estimate was based on an incomplete list prepared by Stanley of the Union Pacific (R. 66, 811–813, 902, 1079–1080, 2173–2174). In addition to the actual rental credits, the dealers were in some cases offered free refrigeration for a specified period. The cash payments and rental credits were purportedly offered to dealers to reimburse them for the expense of moving from the Kansas City, Missouri, market to the new terminal. (Fdg. 20, R. 353.) However, the primary objective of those who conducted the negotiations was not ascertainment of

the expense to the dealers in moving but ascertainment of the amount necessary to secure the move (Op., R. 250).[8]

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[8] Appellants attack the court's conclusion on the ground that there is no evidence that the City intended to pay anything in excess of actual costs (Br. 162–163). However, there was no relation between the sums fixed in the various proposals negotiated with the dealers by Stanley and the actual costs of moving or the value of any tangible assets turned over to the City. It is true that in at least one instance the agreement provided that title to the furniture and fixtures of the dealer should pass to the City (R. 2675). Also, all leases provided that if the property vacated in Missouri was sublet, the rents should be paid over to the City (R. 2674). However, in view of appellants' intent to destroy the Missouri wholesale market (Fdg. 20, R. 354), and the provisions in the agreement that the dealer would not engage in business in Missouri and the Missouri premises would not be sublet without the consent of the City (R. 2673–2674), it seems highly unlikely that the City expected any return except the acquisition of tenants.

The evidence emphasizes the fact that the cash payments were intended as gratuities. In the course of negotiating with the dealers on the proposals to be submitted to the City, Stanley of the Union Pacific made the following agreements and offers:

(1) He agreed with Winnick Brothers on a proposition calling for the payment of $12,000 for furniture and fixtures, although a member of the firm subsequently admitted that the actual cost was less than $1,000 (R. 610–611).

(2) He agreed on a proposition with Litman calling for the payment of $15,000 based in part on an obligation to pay six years' rent on an unexpired lease in Missouri when in fact the lease expired in a few months (R. 551–552, 722, 2674–2675).

(3) O. C. Evans Company, which refused to submit any claim for losses, was offered $5,000 and when it demanded

Second. Free rents and reduced rents were specifically provided for in the standard form of lease. The leases offered to the dealers provided that rents should not commence until the official completion date, which was fixed as February 1, 1940 (R. 2618, 1767–1768, 1777, 1787, 2524), although the terminal was substantially completed and was opened for business on December 4, 1939 (Fdg. 17, R. 350). The lease also provided for a standard rental of $150.00 per month per unit, but required the payment of only $50.00 per month for the first three months after the official completion date (R. 2618, 1947, 1047). These concessions assume added signifi-

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$10,000 the offer was increased to $7,000, Stanley saying that that was all the City had left (R. 715, 716).

(4) Garrett-Holmes and Company demanded $35,000, and in support listed four items of expense totalling $39,780, of which $25,200 was accounted for by a demand for three years' free rent at the new terminal. After negotiations with Stanley, the total was reduced to $30,500, and when Stanley submitted the proposal to the City, the claim for free rent had been eliminated and in its stead an item of $20,000 for unamortized cost of fixtures and equipment inserted (R. 465–473, 2179; Ex. 60, R. 2488).

(5) A similar pattern is found in the negotiations by which the offer to Ziegler was increased from $1,000 and one year's free rent to $5,000 and free rent (R. 458–460); the offer to Mallin Produce Company was increased from $15,000 to $20,000 when it agreed to rent two units instead of one (R. 449–451); Robinson was allowed $600 on six months of an unexpired lease when the tenancy was actually on a month-to-month basis (R. 567, 710); and fictitious values were used to increase the claim of Cherrito from $900 to $1,400 (R. 455–456).

cance by reason of the fact that the Union Pacific aided in preparing the standard leases offered to dealers and, through its own officials and DeOreo and Fean, who were on the pay roll of its corporate subsidiary, conducted the campaign to persuade the dealers to sign the leases (Op., R. 244; Fdg. 12, 14, R. 345–346, 348).

The City made an estimate of the total amount of the payments necessary to be made as concessions, the estimate being based upon a report of the committee of three prepared and submitted by the Union Pacific member (Op., R. 249). An ordinance was then passed authorizing payments based on this estimate, upon the execution of a contract by the dealer agreeing to move to the new market and of a bond guaranteeing the performance of the contract (Op., R. 249–250).

In order to provide the City with funds with which to make the payments to the dealers, Union Pacific induced City Ice & Fuel Company, tenant of the cold storage space at the terminal, to pay $80,000 to the City as advance rent (Fdg. 24, R. 355; Op., R. 248–249).[9] Union Pacific also sug-

[9] Union Pacific had assisted in securing the City Ice & Fuel Company as a tenant for the cold storage facilities. As an inducement to the City Ice & Fuel Company to lease these premises, Union Pacific and its subsidiary, Pacific Fruit Express Company, agreed to purchase from the Company their entire ice requirements at Kansas City and Omaha. (Fdg. 27, R. 357.)

gested, and the City agreed, that the concessions be financed in part through the issuance of City warrants chargeable only against future rentals of the market (Fdgs. 19, 24, R. 352, 355). To settle the question of the City's authority under state law to make the payments out of the advance rentals, Union Pacific aided in preparing pleadings for, securing the institution of, and conducting proceedings in the Supreme Court of Kansas whereby it was determined that the City, acting in its proprietary capacity, might make the payments without violating the law of Kansas (Fdg. 25, R. 355–356). In the course of those proceedings Union Pacific announced through one of its attorneys that it, as the holder of $3,000,000 of the City's revenue bonds, approved of the use which the City proposed to make of the advance rentals (Fdg. 25, R. 356).

It is undisputed that the City intended to make the payments. The ordinance, which was the basis of the legal proceedings, recited the necessity of making the payments and giving rental credits, and authorized the Board of City Commissioners to do so (R. 25–27). At the time this suit was commenced, the Board had approved one of the propositions negotiated in the manner previously described and was about to make the payment (R. 2525, 2674–2675, 818–819). Actually, no cash payments have as yet been made, although up until nearly the close of the evidence in the

court below, many dealers were occupying space in the terminal without paying any rent (Ex. 102, R. 2833–2834; R. 690, 951; *cf.* R. 1256, 1288).

In addition to collaborating with and directing the activities of the City in inducing tenants to move to the terminal, Union Pacific was not idle on its own behalf. For example, the evidence shows that it offered and gave free advertising to the dealers. As appellants point out in their brief (p. 230), the Union Pacific contracted for daily radio broadcasts from the terminal commencing December 18, 1939. They rely on the terms of the contract as showing that no free advertising could be given, but the actual performance under the contract belies the contention. One of the chief features of the radio program was advertising the products of dealers at the terminal (R. 687–688). Eleven of the dealers were interviewed on the program at one time or another and allowed to advertise the kind and quality of their produce (R. 688). In addition, the Union Pacific purchased and distributed 20,000 copies of the rotogravure section of *The Packer* for December 2, 1939, containing pictures of dealers and descriptions of facilities at the new terminal (R. 1087, 1778, 1783).

As part of the general scheme, City Ice & Fuel Company, at the suggestion of Union Pacific, agreed to deposit $25,000 in the Riverview State Bank to secure loans up to $95,000 proposed to

be made by the bank to the defendant produce dealers (Fdg. 24, R. 355).[10] Many such loans were made, and the court noted that there was evidence that one of them may have been somewhat inadequately secured (Op., R. 258–259). Other unsecured and inadequately secured loans were offered to the dealers by Union Pacific, to be made by the bank, but those loans were never consummated (Fdg. 20, R. 353). The undisputed evidence shows that a number of the loans which were consummated were made on no security save the signature of the recipient, and that in many cases there was a close relationship between the amount of the loan and the amount promised to the dealer for moving to the new terminal (R. 652–656, 552–

[10] Appellants assert in their brief (pp. 231–232) that the evidence does not support the court's finding that the Union Pacific proposed and urged the City Ice & Fuel Company to guarantee the bank loans. On November 20, 1939, Haugh, of the Union Pacific, notified Stanley that he had arranged for G. F. Ashby, assistant to the president of the Union Pacific, to be in Kansas City on the following day for the purpose of discussing bank credits with Stanley and with Breidenthal of the Riverview State Bank (Ex. 12, R. 1765–1766; Ex. 13, R. 1944). Prior to that time he had arranged for officials of the Union Pacific and its local corporate subsidiary to discuss with a committee of bankers the question of credits for produce dealers at the new terminal (Ex. 12, R. 1765). Within two weeks after Ashby's visit to Breidenthal, the City Ice & Fuel Company, which had previously paid $80,000 in advance rentals at the instigation of the Union Pacific, deposited $25,000 in the Riverview State Bank to guarantee the loans to the produce dealers (R. 521; Ex. 71, R. 2738).

553). At least two unsecured loans were made to dealers who were insolvent (R. 653, 566, 656, 1263).

The business of the produce dealers who were solicited to move to the new terminal was handling produce shipped by rail in interstate commerce, and the new premises were restricted to occupancy for that purpose alone (Fdg. 23, R. 355). Throughout all phases of its activities in connection with the construction and promotion of the terminal, the principal motive of the Union Pacific was to secure the traffic of those dealers for its lines (Fdg. 28, R. 357). It intended to divert that traffic from competing lines and to avoid sharing it at the terminal with other railroads (Fdgs. 29, 32, R. 358, 359).[11] The diversion of traffic from

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[11] Appellants emphasize in their brief (pp. 45–46, 51–52) the fact that one of the conditions of the P. W. A. grant was that the terminal be available to all railroads entering the city upon fair and reasonable terms and without discrimination (Ex. 62–B, R. 2576–2578). But this fact is not contrary to the court's finding that the purpose of Union Pacific's activities in connection with the terminal was to divert traffic to its lines from competing carriers. The lower court found (Fdg. 36, R. 361), on the basis of convincing testimony (R. 692–693, 699, 708, 1515), that a railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic. This arises from the proven disposition of shippers located at a place exclusively served by a particular railroad to give to that railroad the major portion of their business. Furthermore, although Union Pacific was required to render interchange service for the other carriers at the terminal, it received substantial compensation for so doing (see p. 14, *supra*), thus putting the other carriers at a considerable disadvantage.

the appellee carriers to the Union Pacific would amount to over $770,000 per year if all the defendant dealers were induced to move to the new terminal (Fdg. 36, R. 361–362).

In contrast to the immediate and continuing benefit accruing to Union Pacific from the project (Fdg. 34, R. 360), the City can secure no direct financial return from the terminal for many years since all the market's revenues, after operating expenses, must be paid to Union Pacific for interest and amortization charges on, and for redemption of, the bonds, until all the bonds are retired (R. 2572). The City's own estimate, based on 90% occupancy as compared with present occupancy of 35% and the assumption that the rental rates will not decrease, and without any allowance for depreciation, is that the bonds will be paid off in twenty-two years (Fdg. 34, R. 360).

THE INJUNCTION

On the basis of the foregoing findings of fact, the District Court concluded that violations of the Elkins Act and of the Interstate Commerce Act by all of the defendants had been established.[12] Accordingly, it directed entry of a decree which, insofar as it is directed against appellants, enjoins them, their officers, agents, and employees (R. 378–379):

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[12] Elaborate conclusions of law to this effect were filed by the court (R. 366–376).

1. From offering or giving cash payments or rental credits, free rents and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to produce dealers to induce them to move to the new terminal; and

2. From permitting any produce dealer to remain as a tenant of the new terminal unless the dealer (a) pays the standard rental for past occupancy in obedience to the temporary restraining order and temporary injunction, and (b) pays future rentals at the same rate as all other shippers, which rate shall not amount to a rebate or concession and shall be adequate to pay all operating expenses including depreciation and a proper rate of return on the full value of the terminal facilities.

The decree also contains corresponding injunctive provisions directed against DeOreo and Fean and the defendant produce dealers (R. 379–380). Pending final determination of the case on appeal, the City is required to file with the court monthly statements of the rentals collected (R. 380–381).

SUMMARY OF ARGUMENT

The Interstate Commerce Act and the Elkins Act broadly prohibit the offer or grant of any valuable consideration as an inducement to secure the traffic of a particular shipper for a particular carrier's lines. The authorities construing this

statutory prohibition establish that a violation of the prohibition occurs (a) whenever a carrier or any other person, directly or indirectly, offers or gives something of value to a shipper in order to procure the shipper's traffic for the carrier's lines, and (b) whenever a shipper receives something of value as compensation, direct or indirect, for shipping his goods over a particular carrier's lines.

The present case falls well within this rule. The record discloses that Union Pacific devised the plan for the development of a produce terminal on city property served exclusively by the lines of the Union Pacific and that it played a dominating and leading part in every phase of the promotion, financing, and construction of the terminal. When it became evident that the success of the terminal could be assured only by offering valuable inducements to produce dealers to persuade them to move their businesses to the terminal, Union Pacific devised and induced the City to accept a scheme by which that could be accomplished. The most important inducements which were to be offered to the dealers were free rents, reduced rents and cash bonuses to be given in the name of the City. However, the Union Pacific gave certain valuable inducements—for example, free trips and free advertising—directly to the dealers.

There can be no question but that all the inducements offered to the produce dealers were in

respect to transportation. The dealers were in the business of handling transcontinental carload shipments of produce. The new terminal facilities were designed principally for handling that type of freight, and occupancy of space in the produce buildings was limited to persons engaged in handling such freight. The primary purpose of Union Pacific in promoting and developing the terminal was to increase the shipment of produce over its own lines, and the record discloses that securing the produce dealers as tenants of the terminal would have this effect.

Insofar as Union Pacific offered free advertising and free transportation directly to dealers for the purpose of inducing them to move to the new terminal, the violation of the Interstate Commerce and Elkins Acts is plain. The inducements offered to dealers in the name of the City were equally illegal for three reasons: first, because Union Pacific was responsible for, and participated in giving, the concessions by reason of the fact that it originated the scheme, was the motivating force in all phases of its execution, and bore a major part of the financial burden; second, because, completely apart from Union Pacific's participation, it was illegal for the City to make the concessions for the purpose of procuring traffic for Union Pacific; and third, because the mere offering of concessions by Union Pacific was illegal

even though the concessions were payable in the name of the City.

The court below properly framed its decree to prevent future violations of the Act by enjoining appellants from renting space in the terminal to produce dealers at inadequate rentals. The record shows that appellants had been permitting tenants to remain at the terminal, although the dealers paid no rent or paid only a portion of the standard rentals. In these circumstances the court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. In so doing the court did not disregard the applicable state law but merely enforced the paramount federal law regulating interstate commerce.

ARGUMENT

I

THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT BROADLY PROHIBIT THE OFFER OR GRANT OF ANY VALUABLE CONSIDERATION AS AN INDUCEMENT TO SECURE THE TRAFFIC OF A PARTICULAR SHIPPER FOR A PARTICULAR CARRIER'S LINE

This case involves two classes of inducements offered and given by appellants Union Pacific and the City to the defendant produce dealers for the purpose of persuading them to move their businesses to the new terminal: first, inducements directly offered and given to the dealers by the Union Pacific, and second, inducements offered and

given to the dealers in the name of the City. The illegality of the inducements falling in the first class is discussed in Point II (*infra*, pp. 38–43), and the illegality of the second type in Point III (*infra*, pp. 43–69). Underlying the discussion in both points, however, is the fundamental assumption that the types of inducements offered and given—*i.e.*, free transportation, free advertising, free rentals, reduced rentals, cash bonuses, and the like—constitute rebates, concessions, advantages, or discriminations which are unlawful under the Interstate Commerce Act and the Elkins Act when given in respect to transportation. Before making a detailed examination of the particular concessions here involved, therefore, it is necessary to examine generally into the scope of the prohibition against concessions imposed by the Interstate Commerce Act and the Elkins Act and into the extent of the limitation contained in the proviso that the concessions are unlawful only if made in respect to transportation.

The underlying purpose and aim of the 1887 Act to Regulate Commerce (c. 104, 24 Stat. 379) was to eliminate unjust discrimination between persons, places, or commodities in the transportation of property by railroad.[12] The means adopted in that Act was a direct prohibition against the carrier

[12] Sen. Rep. No. 46, 49th Cong., 1st Sess., pp. 188–190, 215; Sharfman, *The Interstate Commerce Commission*, Vol. I, pp. 17–18; *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479; *Atchison &c. Ry. Co.* v. *Robinson*, 233 U. S. 173.

practicing such discrimination, coupled with criminal penalties applicable to the officers and agents of the carrier (c. 104, 24 Stat. 379, 380, 382). It soon became apparent however, that the machinery provided was entirely inadequate to accomplish the Congressional purpose.[13] In spite of the desire of both railroads and shippers to stamp out the forbidden practices, they continued to flourish.[14] Consequently, in 1903 Congress acted upon the repeated recommendations of the Interstate Commerce Commission and passed the Elkins Act (c. 708, 32 Stat. 847, 49 U. S. C. §§ 41–45) which was in reality an amendment to the original act designed to close the loopholes and strengthen and broaden the prohibition against concessions and discriminations in every form. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 341 (D. N. J.).

The Elkins Act is cast in extremely broad terms. It provides in Section 1 (1) that:

> * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any prop-

[13] See Annual Report, I. C. C., 1897, pp. 45–48; Annual Report, I. C. C. 1900, pp. 10–11; Annual Report, I. C. C., 1901, pp. 5–16; Annual Report, I. C. C., 1902, pp. 6–10; *Missouri Pacific Ry.* v. *United States*, 189 U. S. 274.

[14] See Annual Report, I. C. C., 1897, pp. 46–48; Annual Report, I. C. C., 1902, pp. 6–8; Sharfman, *The Interstate Commerce Commission*, Vol. I, p. 37.

> erty in interstate or foreign commerce by any common carrier * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, * * * or whereby any other advantage is given or discrimination is practiced.

In 1906 the Elkins Act was implemented by the Hepburn Act, which amended and strengthened certain provisions of the statute, but which left the quoted language unchanged.

The Elkins Act plainly expresses the legislative intent to place prohibitions of the most sweeping character upon every form of concession which a carrier might offer or a shipper might receive in respect to transportation. Since 1906 numerous cases have arisen requiring judicial construction of that legislation. With striking uniformity, the courts have held that the statute is not to be construed strictly but is to be given a broad interpretation designed to effectuate the clearly manifested intent of Congress. Cf. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72; *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 520. This Court has had occasion to note that "it is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit all practices which run counter to the

purpose of the act to place all shippers upon equal terms." *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, 309. To aid in the accomplishment of that objective the courts have not hesitated to brush aside summarily all pretense and legal fiction in order to strike down inequality of every kind. *Cf. United States* v. *Union Stock Yard & Transit Co., supra; Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498.

It will be noted that the courts, in discussing the prohibition against concessions, refer to it as being contained in both the Interstate Commerce Act and the Elkins Act. In like manner the court below determined that the facts of this case constituted a violation of both statutes. Certainly, consideration of the entire legislative development of the prohibition against concessions is necessary to understand the sweeping character of that prohibition and the liberal construction which the courts have placed upon it. However, the provision of the Elkins Act quoted above is the culmination of the legislative effort to create an all-inclusive prohibition. A violation of the applicable sections of the Interstate Commerce Act would also be a violation of the even more sweeping terms of the Elkins Act. Consequently, for purposes of this brief, we will confine our discussion, insofar as it relates to exact statutory language, to a consideration of Section 1 (1) of the Elkins Act above set forth.

As the statute now stands it condemns four specific practices: (1) rebates, (2) concessions, (3) advantages, and (4) discriminations. A rebate is a return of part of the rate originally collected in order to give transportation at less than the published rate. *United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521. A concession is a yielding or departure from the published rate. *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 518. An advantage is the preference of one shipper over another. *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155, 165–166. A discrimination is the failure to treat all shippers alike; when one shipper receives an advantage, another suffers a correlative discrimination. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, 308–309. For the purposes of this brief it is unnecessary to distinguish between the various terms, and we shall apply to all of them the generic term "concessions."

As pointed out above, the courts have exercised every precaution against narrowing the application of the statute in any manner which would defeat the Congressional purpose. With equal care, the courts have refrained from restricting by definition and classification the determination of what amounts to a concession. Obviously, the determination of whether or not a concession has been given depends upon the facts of the particular case. The only general rule which can be formulated is that the statute prevents the offering or

giving of anything which amounts to a preference or advantage to a particular shipper or a diminution of the published tariff rates applicable to that shipper's traffic. Cf. *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 523–524. And in applying this general rule the courts have held illegal practically every form of valuable consideration which could conceivably be held out to a shipper for the purpose of inducing him to ship over the lines of a particular carrier.[15]

The only restriction in the statute upon the all-embracing prohibition of concessions is that the concession must be "in respect to the transportation of * * * property in * * * commerce by any common carrier * * *." This provision, in effect, merely makes explicit what

[15] See, *e. g.*, *Baltimore & Ohio R. Co.* v. *United States, supra; Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 444; *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Central of Georgia Ry. Co.* v. *Blount,* 238 Fed. 292 (C. C. A. 5th); *Cleveland C., C. & St. L. Ry. Co.* v. *Hirsch,* 204 Fed. 849 (C. C. A. 6th); *Northern Central Ry. Co.* v. *United States,* 241 Fed. 25 (C. C. A. 2d), certiorari denied, 245 U. S. 645; *Vandalia R. Co.* v. *United States,* 226 Fed. 713 (C. C. A. 7th), certiorari denied, 239 U. S. 642; *Duplan Silk Co.* v. *American, etc. Marine Ins. Co.,* 205 Fed. 724 (C. C. A. 2d); *United States* v. *Sunday Creek Co.,* 194 Fed. 252 (N. D. Ohio), affirmed 210 Fed. 747 (C. C. A. 6th), certiorari denied, 234 U. S. 757; *United States* v. *Hocking Valley Ry.,* 194 Fed. 234 (N. D. Ohio), affirmed 210 Fed. 735 (C. C. A. 6th), certiofari denied, 234 U. S. 757.

is implicit in the statute as a whole, namely, that a concession is unlawful only if the purpose or necessary effect of its offer or grant is to persuade a shipper to avail himself of the services of a particular carrier. Indeed, this interdicted purpose is for all practical purposes assumed whenever there is proof of direct participation by a carrier in the offering or giving of a concession to a shipper or prospective shipper. See cases cited in note 15, on the opposite page. There is no requirement that a concession be given or offered with respect to any particular shipment or even by giving favored treatment with respect to shipping service; the law prohibits favored treatment with respect to non-transportation services furnished by a carrier to a shipper as well as concessions directly connected with transportation. *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 523. And concessions are equally unlawful whether made in a cash sum, paid in advance, or by earlier or later indirect payments. *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286; *Vandalia R. Co.* v. *United States,* 226 Fed. 713 (C. C. A. 7th); *Grand Rapids & Ind. Ry. Co.* v. *United States,* 212 Fed. 577 (C. C. A. 6th), certiorari denied, 234 U. S. 762.

To summarize the foregoing discussion, we believe it clear that a violation of the Elkins Act occurs (a) whenever a carrier or any other person directly or indirectly offers or gives something of value to a shipper in order to procure the shipper's

traffic for the carrier's lines, and (b) whenever a shipper receives anything of value as compensation direct or indirect for shipping his goods over a particular carrier's lines. We turn, then, to the question of whether, under this rule, the concessions directly given by the Union Pacific and the concessions offered and given in the name of the City were unlawful.

II

THE CONCESSIONS GIVEN TO THE DEFENDANT PRODUCE DEALERS DIRECTLY BY UNION PACIFIC WERE ILLEGAL

The most substantial and important inducements offered and given to the defendant produce dealers in order to persuade them to move to the new terminal were those offered and given in the name of the City. The Union Pacific, having devised the plan for offering those inducements in the apparently sincere belief that it had formulated a scheme which circumvented the prohibitions of the Elkins Act, now rests its case primarily on the proposition that the factual illusion which the plan was designed to create must be accepted as reality. The emphasis on this part of the case has resulted in obscuring the fact that the Union Pacific gave certain direct concessions to the defendant produce dealers. While comparatively those concessions are minor in character, their illegality is plain and the circumstance is important in considering the whole course of transactions.

A. UNION PACIFIC GAVE FREE TRANSPORTATION AND FREE ADVERTISING TO DEFENDANT PRODUCE DEALERS TO PROCURE THEIR BUSINESS

The record plainly shows that the Union Pacific gave free trips to the defendant produce dealers who were prospective tenants of the terminal being built on the lines of the Union Pacific. The record likewise shows that Union Pacific offered and gave the defendant dealers a certain amount of free advertising.

Appellants do not deny that fifteen produce dealers at the Missouri market were taken on an inspection trip so that they might have an opportunity to see the advantages of produce terminals at Chicago, Cleveland, Buffalo, and St. Louis similar to the new terminal which was proposed for Kansas City, Kansas. They attempt to justify the trip, however, by contending that the $2,000 which it cost Union Pacific was money which Union Pacific advanced to DeOreo and Fean on the expectation that it would be repaid. The surrounding circumstances and actual results belie the contention.

The suggestion that the trip should be given to the dealers emanated from the Union Pacific. In February 1938, Haugh wrote to Stanley suggesting the trip and a plan for financing it (R. 1840–1841). Subsequently, the Union Pacific "advanced" $2,000 to DeOreo and Fean for the expenses of the trip, but in order "to establish the transaction to the satisfaction of the city officials

and lay a proper foundation for a claim," it had DeOreo and Fean make out a receipt to Breidenthal, the President of the Riverview State Bank (R. 1844, 2243). The receipt provided that the money was not to be repaid unless the terminal was constructed and was leased by DeOreo and Fean as exclusive agents (R. 2243). Inasmuch as the agency contract between the City and DeOreo and Fean was cancelled prior to the construction of the terminal (R. 2555–2556), the latter condition failed and there is now no color of obligation upon anyone to repay the $2,000 advanced by the Union Pacific and spent for the trip.

The free advertising given to the dealers at the market was donated even more directly by the Union Pacific. As an inducement to persuade dealers to move to the market, Stanley offered them free advertising (R. 459). When the market was opened for business the Union Pacific purchased and distributed 20,000 copies of the rotogravure section of *The Packer* for December 2, 1939, containing photographs of many of the produce dealers and a description of the terminal facilities (R. 1087, 1778, 1783). The Union Pacific also sponsored daily radio broadcasts from the terminal (R. 686–688). Appellants rely on the contract with the radio station as establishing that Union Pacific was not permitted to give advertising to dealers (Br. 230). In fact, however, eleven of the defendant dealers were interviewed at va-

rious times on the program and were allowed to advertise the kind and quality of produce which they had for sale on that particular day (R. 688). Obviously these facts sustain the finding of the court below that the dealers were offered and given free advertising paid for by the Union Pacific (Fdg. 20, R. 353).

B. THE ILLEGALITY OF THE CONCESSIONS GIVEN DIRECTLY BY THE UNION PACIFIC

There can be little question concerning the illegality of the free advertising and free transportation given to the dealers by Union Pacific. As we have shown (pp. 30–38, *supra*), it is a violation of the Elkins Act for a carrier to give any valuable inducement to secure a shipper's traffic; the free advertising and free transportation were just such inducements. Indeed, the illegality of Union Pacific's action is emphasized by the fact that similar concessions had previously been held unlawful by the Interstate Commerce Commission and the courts.

In *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, the Commission was called upon to decide whether the statute prohibited carriers from allowing shippers to display advertising on the exterior of privately owned cars. In answer to that question the Commission said (p. 582): "We further find * * * that a shipper who pays only published rates and uses private cars dis-

playing advertising matter receives something of value in addition to the transportation of his traffic not available to those using cars furnished by the railroads and that the practice should be prohibited * * *." This decision of the Commission is fully applicable to the present case. Produce dealers at the new terminal were given advertising which was not given to the dealers who remained at the Missouri market. Obviously those dealers who received the advertising received from the Union Pacific something of value which was not included in the published tariffs for the shipment of produce over the carrier's lines.

In *Chicago, Ind. & L. Ry. Co.* v. *United States,* 219 U. S. 486, this Court held that giving transportation in return for advertising space amounts to an unlawful concession. *A fortiori,* the giving of free transportation must be unlawful. See *American Express Co.* v. *United States,* 212 U. S. 522, in which it was held that a carrier is prohibited from giving free transportation of property even to its own employees.

It is equally clear that the concessions were given by the Union Pacific "in respect to transportation." The principal and compelling motive of the Union Pacific throughout all phases of the promotion, financing, and construction of the terminal was to secure additional traffic for its lines (Fdg. 28, R. 357). At frequent intervals it made estimates of the amount of additional revenue

which it would receive (Fdg. 28, R. 357). The traffic which it was seeking was that of the produce dealers who were given the concessions, and its purpose was to divert that traffic from competing roads (Fdg. 23, 29, R. 354–355, 358). The Union Pacific is not an eleemosynary institution and it can hardly be doubted that any amounts which it spent on produce dealers for free advertising and free trips were expected to bear fruit in the form of increased traffic for its lines. In these circumstances, the court below was manifestly correct in holding that the concessions were given "in respect to transportation" and that they were consequently violative of the Elkins Act.

III

THE CONCESSIONS OFFERED AND GIVEN TO THE DEFENDANT PRODUCE DEALERS IN THE NAME OF THE CITY WERE ILLEGAL

As we have pointed out, with respect to the more important concessions made to the defendant produce dealers—the free rents, the reduced rents, and the cash bonuses—the Union Pacific attempted to avoid transgression of the law by the device of having the concessions made in the name of the City. Appellants, as we understand their position, do not seriously question that these concessions, if made directly by Union Pacific to procure traffic, would be illegal; their contention is, in effect, that the interposition of the City removes the taint of illegality.

The contention fails for three reasons: first, because Union Pacific was responsible for, and participated in giving, the concessions by reason of the fact that it originated the scheme, was the motivating force in all phases of its execution, and bore the major part of the financial burden; second, because, completely apart from Union Pacific participation, it was illegal for the City to make the concessions for the purpose of procuring traffic for Union Pacific; and third, because the mere offering of concessions by Union Pacific was illegal even though the concessions were payable in the name of the City.

A. THE CONCESSIONS WERE ILLEGAL BECAUSE OF UNION PACIFIC PARTICIPATION

1. Union Pacific participation in the origination and execution of the scheme

It is entirely clear from the findings of fact and opinion of the court below that it was Union Pacific which originated the device of giving concessions to the defendant produce dealers in order to induce them to move to the new market, that it was Union Pacific's officials who carried on the negotiations with the dealers looking towards this end, and that the City became a party to the scheme only because Union Pacific insisted upon its participation as a means of avoiding the prohibitions of the Elkins Act.

As early as August 1937, Union Pacific contemplated the necessity of giving concessions to the

dealers to induce them to move, either by making direct payments to them or by buying unwanted property from them (Fdg. 19, R. 351; Op., R. 246). The executives of Union Pacific were aware, however, that such concessions, if made directly by the railroad, would violate the Elkins Act (Op., R. 246–247, 249). Consequently they conceived the device of attempting to circumvent the Act by having the payments made by the City and secured an opinion from Union Pacific's law department that this would be legal. This was done and negotiations with the produce dealers with respect to the concessions were commenced before the City was even apprised that the dealers would have to be paid to move. (Op., R. 246–247; Fdg. 19, R. 351–352.)

The next step was to assure the acquiescence of the City. Haugh, Union Pacific's vice president, appeared before the Board of City Commissioners and presented the proposal (Fdg. 19, R. 352). But the City moved with obvious reluctance. It first appointed a committee of prominent citizens to consider the matter (Op., R. 248). At a meeting of this committee, Haugh made a carefully prepared speech as proponent of the plan (Ex. 12, R. 1777, 1780–1781; Ex. 13, R. 1946–1947; R. 857–859, 1118–1121, 1130) and eventually obtained the committee's approval (Op., R. 248). Then the City officials insisted upon a test suit in the state courts in order to establish the legality of the payments under state law. In this test suit, brought in the Supreme Court of

Kansas, Union Pacific assisted in drafting both the petition and answer, otherwise assisted the City in the litigation, and at least partially directed the conduct of the suit (Fdg. 25, R. 355–356; Op., R. 248).

Union Pacific played an even more dominant role in the actual negotiations with the dealers. It initiated and participated in all of the negotiations, for the most part out of the presence of any official or agent of the City (Fdg. 26, R. 356). Sometimes the negotiations were handled by a Union Pacific executive alone, sometimes by a committee of three of which that executive was one, and sometimes by DeOreo at a time when he was receiving regularly monthly advances from the Union Pacific (Fdg. 20, R. 352–353; Op., R. 248). When negotiations resulted in an understanding with a produce dealer, the dealer was told that Union Pacific could not pay him but that the matter would be submitted to the City (Op., R. 249).

The City made an estimate of the total amount of the payments necessary to be made as concessions, the estimate being based upon a report of the committee of three prepared by the Union Pacific member (Op., R. 249). An ordinance was then passed authorizing payments based on this estimate, upon the execution of a contract by the dealer agreeing to move to the new market and of a bond guaranteeing performance of the contract (Op., R. 249–250).

There remained the final problem of securing funds with which the City could make the payments. The City had neither the inclination nor the authority to make them out of its general revenues. Again the solution was furnished by Union Pacific. Upon its suggestion and insistence, City Ice & Fuel Company, the tenant of the market's cold storage unit under a lease calling for an annual rental of $37,500, agreed to pay $80,000 cash to the City as advance rent for the specific purpose of having this sum used to make the contemplated payments to the produce dealers (Fdg. 24, R. 355; Op., R. 248–249). Union Pacific also suggested, and the City agreed, that the remainder of the required funds be secured through the issuance of City warrants chargeable only against future rentals of the market (Fdgs. 19, 24, R. 352, 355).

At every stage of the process, therefore, it was Union Pacific which was the motivating force: Union Pacific originated the idea of giving concessions, it induced the City to accept the idea, and its officials took the lead in every phase of executing the idea. There can be little doubt, we believe, that concessions given under these circumstances are as much a violation of the Elkins Act as concessions given directly by the railroad. But if there be any such doubt, it is removed by the additional and conclusive circumstance that the concessions were made at least as much at the ex-

pense of the Union Pacific as at the expense of the City.

2. Union Pacific's financial participation in the scheme

Appellants appear to take the position in their brief that Union Pacific cannot be considered as having made a financial contribution to the payment of the concessions unless Union Pacific, as holder of the City's revenue bonds, had a right which it waived to prevent diversion of the revenues for this purpose. Appellants then proceed to argue extensively that the Union Pacific had no such right and consequently could not have waived it (Br. 171–190).

The argument is beside the mark. The question here is not one of waiver of lien; it is the more fundamental question of whether Union Pacific is or may be required to bear the financial burden of the contemplated concessions. The concessions, as we have stated, are to be paid from two sources: first, from the advance rental of $80,000 paid by the City Ice & Fuel Company, and second, from the sale of City warrants chargeable against future rentals of the market. Neither the City nor the Union Pacific is to make any immediate capital contribution; the concessions are rather to be paid by the present expenditure of moneys representing future income. The financial burden of the payments will ultimately

fall, therefore, upon the party which would otherwise have had the benefit of that future income. And it is clear from the record, we believe, that that party is or may be the Union Pacific.

It will be recalled (*supra*, p. 14) that the only investment of the City in the market was the contribution of the idle Public Levee lands and the expenditure of $149,000, derived from taxation or the sale of general obligation bonds, for street and sewer improvements in the terminal area. The remainder of the funds used for construction of the terminal came from a $1,710,000 P. W. A. grant and from the sale to Union Pacific of revenue bonds aggregating $3,000,000. These bonds provide that any revenues remaining after the payment of interest and amortization charges are to be devoted to the redemption of outstanding bonds. Consequently, Union Pacific, as owner of the entire bond issue, is entitled to all the revenues of the project, after operating expenses, until all the bonds are retired.

According to the City's own estimates of the revenues and expenses of the project, which the court below found to be unduly optimistic, the entire bond issue will not be retired for twenty-two years (Fdg. 34, R. 359–360). During this period, all the revenues of the project will go to Union Pacific and the City will get no income whatever. If the bonds are not all retired by the end of the twenty-two year period, as the court below believed they

would not be, the City will continue to receive no income. And if the market proves to be a failure, so that all of the bonds cannot be redeemed in full, the City will never receive any income from the project.

In this situation it is clear that the only financial effect on the City of the payment of the concessions would be a possible diminution of future income twenty-two years or more hence. The City is to make no immediate cash contribution and is to incur no general liability. The issuance of the contemplated revenue warrants and the diversion of funds from servicing the bonds to paying the concessions may delay retirement of the bonds and thus result in postponement of the date on which the City is entitled to enjoyment of the revenues. But apart from this possible loss of income several decades in the future, the City can bear no financial burden whatever by reason of the concessions.

The Union Pacific is in a far different situation. It is Union Pacific which is entitled to all the revenues of the project for at least the first twenty-two years. Consequently, any revenues diverted to the payment of concessions is money which, but for the diversion, would be subject to the lien of the bonds and would be paid to Union Pacific either as interest on, or for redemption or retirement of, the bonds. Until all the bonds are retired, therefore, it is Union Pacific and Union Pacific alone which must bear the financial burden of the concessions.

And if the terminal project should fail before all the bonds are retired, that burden will never be passed on to the City.

In this view of the case it is not material whether, as appellants contend (Br. 172–177), the concessions are operating expenses which are payable out of the revenues of the project before the lien of the bonds attaches. Assuming this to be true (but see pp. 52–53, *infra*), the fact still remains that, if the concessions are not given, the revenues used to pay the concessions will be subject to Union Pacific's lien. We have the situation, therefore, of Union Pacific inducing the City to pay out funds which, were they not paid out, would be payable to Union Pacific for interest and amortization charges on, or for redemption of, the bonds. This would appear to be a financial participation in the giving of the concessions quite as substantial—and quite as illegal—as the technical waiver of a lien.

Union Pacific stands in much the same relation to the market project as a preferred stockholder does to a corporation which has agreed to retire all of its preferred stock before making any distributions on its common stock. That such a preferred stockholder has a direct financial stake in the conduct of the corporate business and in the use made of its revenues is not open to doubt. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 321. Indeed, in view of the precarious chances of the market for success (Fdg. 34, R. 360; R. 730, 996, 1004, 1006), it would seem that the financial

stake of Union Pacific in the project and, consequently, in any payments made out of the revenues of the project, is far greater than the financial stake of the City.

The financial interest of the Union Pacific in the project assumes added significance in light of the court's finding that in the promotion, construction, and development of the new terminal the Union Pacific took a leading and dominant part (Fdg. 12, R. 344). In other cases involving violations of the Elkins Act this Court has held that where a carrier has a financial interest in, coupled with control over, the company which actually offers or gives a concession, the law will not discriminate between separate corporate identities but will regard them all as a unitary enterprise. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *cf. Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic etc. Ass'n*, 247 U. S. 490, 500–501.

Moreover, appellants' contentions seem wrong even on the technical question of waiver of lien. The City ordinance pursuant to which the bonds were issued provides that the bonds shall constitute a first lien on all revenues of the Public Levee "subject only to the payment of all sums required for the reasonable and proper operation, maintenance and repair of said Public Levee" (R. 2571). The payment of concessions to produce dealers to induce

them to move to the new market would seem clearly to be a capital expenditure rather than an expense of "operation, maintenance and repair" within the meaning of the ordinance. Cf. *Southwestern Bell Tel. Co.* v. *Ft. Smith*, 294 Fed. 102, 103–106 (W. D. Ark.), affirmed, 270 U. S. 627; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 185–186, 191–192; *Landon* v. *Public Utilities Commission*, 242 Fed. 658, 671 (D. Kan.), reversed on other grounds, 249 U. S. 236; *Pioneer Tel. & Tel. Co.* v. *Westenhaver*, 29 Okla. 429, 118 Pac. 354. Certainly the decision in *State ex rel. Parker* v. *Kansas City*, 151 Kans. 1, 151 Kans. 2, upon which appellants base their argument, does not support their position. In that case, as the court below pointed out (Concl. 13, R. 372), the Supreme Court of Kansas merely held that the City had not violated and would not violate any Kansas law by offering, agreeing upon, or giving concessions to the dealers; the court did not consider or decide whether payment of the concessions violated the terms of the revenue bonds and the lien of the Union Pacific.

At the very least, Union Pacific waived the right to claim its lien and to have the validity of its claim judicially determined. From the standpoint of the Elkins Act, there would seem to be little difference between the waiver of an admitted lien and the waiver of a *bona fide*, if disputed, claim of lien; the significant fact in either case is that the carrier contributes something of value to the making of the concession in order to procure traffic for its lines.

The picture disclosed by the record, then, may be summarized as follows: Union Pacific deemed it important for the success of the entire terminal project that concessions be made to the produce dealers to induce them to move. It knew that it could not legally give the concessions itself. It believed that the City could legally give them. So it devised a scheme whereby the concessions would formally be given in the name of the City but the railroad would actually handle the entire transaction through its own officials and would assume the entire financial burden of the concessions for at least the first twenty-two years. It succeeded in getting City approval of this scheme and then proceeded to carry it out as planned. And now it urges that these concessions are, from the standpoint of the Elkins Act, to be considered as being in an entirely different category from concessions directly given by a carrier.

3. Illegality of the scheme

The statutory provisions and the authorities construing them leave no room for doubt that it is quite as illegal for Union Pacific to give inducements to the dealers indirectly, by means of participating in concessions formally given in the name of the City, as it is for Union Pacific to give concessions directly. The substance of what transpires is the same in both situations: the carrier gives up something of value and the shipper re-

ceives something of value in order to assure that the shipper's goods will be transported over the carrier's lines. And since the substance of what is done amounts to the giving of an illegal concession in either case, the form of the transaction is irrelevant.

The Interstate Commerce and Elkins Acts prohibit all practices amounting to a concession, whether carried on "directly or indirectly,"[16] or "in any manner or by any device"[17] or "by any device whatever."[18] As shown above, the legislative history of the statutes demonstrates that Congress meant by the use of this language to strike down every conceivable device for giving rebates and concessions, no matter in what guise the concession may appear or through what instrumentality it may be given or received (pp. 30–38, *supra*). And the statutes have been thus interpreted by this Court. In a decision rendered soon after the Elkins Act was passed (*New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 392), the Court warned that any device to evade the statutory prohibition against rebates and concessions would be given short shrift, declaring that the prohibition is "all-embracing" and "applicable to every method of deal-

[16] Section 2, Interstate Commerce Act, 49 U. S. C. § 2.

[17] Section 6 (7), Interstate Commerce Act, 49 U. S. C. § 6 (7).

[18] Section 1, Elkins Act, 49 U. S. C. § 41.

ing by a carrier by which the forbidden result could be brought about." A few years later, the Court reiterated that the purpose of the Act "was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates * * *." *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72. And again, in *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, 309, the Court declared the statutory purpose to be "to prevent favoritism by any means or device whatsoever and to prohibit all practices which run counter to the purpose of the act to place all shippers upon equal terms." [19]

Consonant with these declarations, every scheme devised to evade the statutory prohibition which

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[19] See also *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 252 (C. C. Wis.); *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. 234 (N. D. Ohio), affirmed, 210 Fed. 735 (C. C. A. 6th), certiorari denied, 234 U. S. 757. In the *Hocking* case, the District Court said (194 Fed. at 251):

"Of course, it is not practicable for Congress to set a limit on human ingenuity in the devising of schemes obnoxious to the act to regulate commerce by attempting a description of all possible methods. The act accomplishes its end by directly and unmistakably condemning results, wherefore every devisable plan to produce the objectionable conditions is under its ban. Surely our jurisprudence is not so inept and feeble that a statute exhibiting a definite purpose to meet palpable mischiefs must be construed so narrowly as to oblige Congress from time to time to amend it that its provisions may be kept, at the best, only in the immediate rear of a procession of new methods born of the fertility of human invention and designed to circumvent that legislative will which it attempts by each amplifying amendment to express."

has come before the courts has uniformly been struck down. One carrier sought to secure traffic by granting shippers warehousing facilities below cost. *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507; cf. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501. Another sought to evade the Act by selling coal at less than cost. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361. Another adopted the device of waiving royalties payable to it by a shipper pursuant to a lease of coal mines. *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25 C. C. A. 2d), certiorari denied, 245 U. S. 645. See also *Central of Georgia Ry. Co.* v. *Blount*, 238 Fed. 292 (C. C. A. 5th); *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849 (C. C. A. 6th). And others sought to procure traffic by loaning money to a shipper at a nominal interest rate or by extending credit to favored customers. *Vandalia R. Co.* v. *United States*, 226 Fed. 713 (C. C. A. 7th), certiorari denied, 239 U. S. 642; *United States* v. *Sunday Creek Co.*, 194 Fed. 252 (N. D. Ohio), affirmed 210 Fed. 747 (C. C. A. 6th), certiorari denied, 234 U. S. 757; *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. 234 (N. D. Ohio), affirmed 210 Fed. 735 (C. C. A. 6th), certiorari denied, 234 U. S. 757. All of these devices, without exception, have been held unlawful. Similarly, the courts have consistently brushed aside the separate corporate entity of related companies when relied upon to justify actions

which were in substance contrary to the policy of the Act. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *cf. Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic etc. Ass'n*, 247 U. S. 490, 500, 501.

The present case is simply another attempt, by a different device, to circumvent the statutory prohibition. The record establishes beyond any question that the Union Pacific officials knew that it would be a violation of the Elkins Act for the railroad to give concessions directly (Ex. 2, R. 1522–1523; Ex. 10, R. 1742–1743). It further establishes that an attempt to stay within the law and yet to accomplish the interdicted result was the motivating reason why the City was interposed between the railroad and the ultimate recipients of the concessions. This attempt must fail just as all similar attempts in the past have failed, the very purpose of the device being the reason for its futility. As the District Court stated with such realistic insight in *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. 234, 252 (N. D. Ohio), "* * * it would seem that one filled with a genuine anxiety to obey the law, when he knew what it was, need make no other inquiry than to ask himself what he hoped to effect by a line of conduct occupying his mind. If it is, by a new method or by one not specifically described in the statute, to accomplish that which the act aims to prevent, the contemplated action is against the statute."

Appellants seek to obscure the issue by arguing at length that the terminal project was not a "joint venture" of Union Pacific and of the City under the law of Kansas; from this premise, they proceed to the conclusion that the City and the Union Pacific cannot be charged with responsibility for each other's acts. It is not necessary for present purposes to examine into the validity of either the premise or the conclusion. The extent of the prohibitions of the Elkins Act does not depend upon the label which the law may attach, for the purpose of ascertaining rights and obligations in other connections, to the relationship and activities of those charged with giving and receiving concessions. A violation of the Act occurs, as we have shown, whenever a carrier, by any means or device, gives up or a shipper receives something of value for a purpose connected with transportation. If that factual situation is shown to exist, the existence of a technical "joint venture," "conspiracy," or "agency" relationship between the carrier and the person in whose name the concession is given need not be established; the Act, as the court below recognized (Op., R. 258), prohibits the result, irrespective of the legal avenue by which the result is reached.

B. THE CONCESSIONS WERE ILLEGAL APART FROM UNION PACIFIC PARTICIPATION

The fact that Union Pacific participated in the giving of the concessions which were payable in

the name of the City is but one reason why those concessions are unlawful. A second and equally cogent reason is that the prohibitions of the Elkins Act operate directly upon the City itself and, irrespective of carrier participation, make it illegal for the City to grant concessions of the type here involved.

The statutory language is not ambiguous. Section 1(1) of the Elkins Act provides that "it shall be unlawful *for any person, persons, or corporation* to offer, grant, or give" any rebate or concession "in respect to the transportation of any property in interstate or foreign commerce by any common carrier." [Italics ours.] Under this provision, it is plain that the prohibition extends to every concession given in respect to transportation; participation by a carrier is not essential since it is unlawful for "any person" to do the prohibited act.

Although the question has never been passed upon by this Court, the lower federal courts have held that the statute is to be so construed. The case most closely analogous to the present one is *Spencer Kellogg & Sons* v. *United States*, 20 F. (2d) 459 (C. C. A. 2d), certiorari denied, 275 U. S. 566. There it was held that an elevator company, although neither a common carrier nor a shipper, was guilty of having given rebates in violation of the Elkins Act. The elevator was used to transfer grain from ships to railroad cars, charges for the

elevation being included in the railroad's tariff, and the railroad, in turn, paying the elevator company for its services. The refunds were paid pursuant to a prior arrangement made by the elevator company, without participation by the railroad, to induce shippers to designate the company's elevator to render the elevation service. The court, holding the refunds to be illegal, pointed to the "broad and sweeping language" of the statute as expressing the Congressional intent "to make the purposes of the act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result." It further stated (pp. 460, 461):

> The application of the statute is not limited to shippers and carriers, but includes and punishes any person or corporation whose intended acts result in the transportation of property at less rates than those mentioned in the tariffs lawfully published and filed by common carriers. Nor is it essential to convict, within the terms of the statute, to prove that there was cooperation by a common carrier.
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> The act concerns itself with preventing concessions and rebates with respect to interstate transportation of property, and not with carriers, shippers, their agents, or anyone else, unless and until their acts result in the accomplishment of that which the statute forbids. It was not intended and

does not permit anyone else, other than shippers and carriers, to grant rebates or concessions.

Again, in *Interstate Commerce Commission* v. *Reichmann,* 145 Fed. 235 (N. D. Ill.), decided in 1906, it was held that a private car company, although neither a carrier nor a shipper, is prohibited by the Elkins Act from paying rebates. The court, reviewing the then recent legislative history of the Act, concluded that Congress had meant what it said when it imposed the prohibition against rebates and concessions upon every person and corporation. The same conclusion was reached in *United States* v. *Miller,* 18 F. Supp. 389 (D. Neb.). There three persons who were neither shippers nor carriers were indicted for receiving rebates in violation of the Elkins Act through the device of placing false weight figures on freight bills. The defendants, pointing to the fact that neither carrier nor shipper had had any part in the scheme, urged that the Elkins Act was inapplicable. The contention was flatly rejected, the court holding, in accord with the other decisions above cited, that Congress had not intended to limit the prohibitions of the Act to shippers and carriers and those acting in concert with them. See also *Dye* v. *United States,* 262 Fed. 6 (C. C. A. 4th); cf. *United States* v. *Milwaukee Refrigerator Transit Co.,* 145 Fed. 1007 (E. D. Wis.).

This interpretation of the statute is in harmony with, if not compelled by, the repeated declarations of this Court that the purpose of Congress in enacting the statute was to cut up by the roots every form of discrimination, favoritism, and inequality. *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *United States* v. *Koenig Coal Co.*, 270 U. S. 512. Inequality will always exist whenever a concession is given to a shipper in respect to transportation, whether the source of the concession be a carrier or another. The statute can accomplish its purpose, therefore, only if all concessions made in respect to transportation fall within its scope, no matter by whom they may be given.

We do not urge, of course, that one shipper may not be preferred over his competitors if the preference is not "in respect to transportation." Thus, in the usual case, no violation of the Act would occur if facilities were leased by a landowner at different rentals to competing shippers, since the purpose of the favored treatment given to the one tenant would not be to procure traffic for a particular carrier's line and thus would not be "in respect to transportation." Ordinarily, a

person which is not itself a carrier or otherwise engaged in the transportation business would not give a shipper a concession in respect to transportation unless, as here, that person were acting on behalf of or in concert with a transportation company; if such a person were not acting with or on behalf of a carrier, it would normally have no reason for giving a concession for the purpose of procuring traffic for the carrier. In practical application, therefore, the statute is necessarily limited almost exclusively to transportation companies and to those acting with them or on their behalf. But, by making the statutory criterion the purpose and necessary effect of the concession rather than the character of the person formally making the concession, Congress has made it unnecessary to establish, by proof which is almost always difficult to obtain, the actual connection of the carrier to the grant of the concession.

There can be no serious dispute concerning the determination of the District Court in this case that the concessions offered and given in the name of the City were "in respect to transportation." As the court pointed out in its opinion, the terms on which, and the circumstances under which, the concessions were offered were such that the necessary and required result was to reduce the amount to be paid for transportation charges (Op., R. 252–257). The fact that the City's primary motive may have been to secure tenants for the new

market rather than to divert traffic to Union Pacific's lines is, as the District Court held, immaterial, since the necessary and intended result of securing such tenants was to require them to engage in interstate transportation over the lines of the Union Pacific. Having reached this determination, there was no necessity under the statute, we believe, for the District Court to have undertaken the additional and arduous task of reviewing the voluminous evidence bearing upon Union Pacific participation in the scheme. Proof of the fact that a concession was offered or given to procure traffic for Union Pacific—proof which, as a practical matter, carries with it a presumption of Union Pacific participation—is all that Congress has required to establish a violation of the Act.

Appellants argue (Br. 193–196) that our position is erroneous because of the language of the penalty clause of the Act, which provides that "Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant * * * accept, or receive" a rebate or concession shall be guilty of a misdemeanor. They contend that the words "whether carrier or shipper" modify or restrict the words "Every person or corporation" and show that no one other than a carrier or shipper was intended to be included. The legislative history of the statute, however, conclusively refutes this contention. As originally enacted in

1903 (32 Stat. 847), the Elkins Act imposed a direct prohibition against rebates by any person, persons, or corporation, and its penalty clause did not contain the phrase "whether carrier or shipper." Despite the broad language of the Act, shippers indicted for accepting rebates contended that they were not covered by the statute but that the statute was directed only against carriers. Accordingly, when the Hepburn Act of 1906 (c. 3591, 34 Stat. 584, 587) was under consideration—a statute designed, of course, to strengthen and not to weaken the Elkins Act [20]—Senator Stone of Missouri suggested on the floor of the Senate that the words "whether carrier or shipper" be inserted in order to eliminate any doubt concerning the applicability of the Act to shippers. The entire legislative discussion concerning this proposal is as follows (40 Cong. Rec. 7022):

> Mr. STONE. I listened to the discussion just had between the Senator from Texas (Mr. Bailey) and the Senator from North Dakota (Mr. McCumber), which seems not to have resulted in any direct proposition as the amendment stands. It is clearly intended to reach shippers as well as carriers and I concur in the view that it ought to reach shippers as well as carriers. There has been some doubt expressed, however, both in and out of the Senate, as to whether

[20] See H. Rep. No. 591, 59th Cong., 1st Sess., p. 3; Sen. Rep. No. 1242, 59th Cong., 1st Sess., p. 2.

the phraseology here does include the shipper. With the view of putting that beyond doubt, I offer an amendment. After the word "corporation" in line 11, page 15, I move to insert a comma and the words "whether carrier or shipper" and a comma.

The PRESIDENT PRO TEMPORE. The Senator from Missouri offers an amendment, which will be read.

The SECRETARY. On Page 15, line 11, after the word "corporation", insert a comma and the words, "whether carrier or shipper" and a comma.

The PRESIDENT PRO TEMPORE. The question is on agreeing to the amendment of the Senator from Missouri to the amendment.

The amendment to the amendment was agreed to.

It is apparent from this discussion that the phrase "whether carrier or shipper" does not, and was not intended to, restrict the generality of the provisions which precede it, as they were originally incorporated in the Elkins Act of 1903. And this has been the consistent holding of the lower federal courts. *Spencer Kellogg & Sons* v. *United States,* 20 F. (2d) 459, certiorari denied, 275 U. S. 566; *United States* v. *Miller,* 18 F. Supp. 389 (D. Neb.); cf. *Dye* v. *United States,* 262 Fed. 6.

We submit, therefore, that the language of the Act should be read as written; that so read the Act prohibits concessions "in respect to transportation" by the City, as well as by the Union Pacific; and that since the concessions offered and given

in the name of the City were "in respect to transportation," they were violative of the Act entirely apart from Union Pacific participation.

C. THE ACTION OF UNION PACIFIC IN OFFERING THE CONCESSIONS WAS A VIOLATION OF THE ELKINS ACT

A final ground supporting the decision below is furnished by the illegality of the action taken by Union Pacific in *offering* the concessions, even though the concessions were immediately payable in the name of the City. Section 1(1) of the Elkins Act makes it unlawful for any person "to offer, grant, or give, or to solicit, accept, or receive" any rebate or concession. Under this provision the act of offering a concession is prohibited equally with the act of giving a concession. This was plainly recognized in *United States* v. *Koenig Coal Co.*, 270 U. S. 512, 519, 520, where the Court said:

> Certainly no one would say that a shipper might not be convicted under the act of soliciting an unlawful concession or advantage or discrimination, even though the carrier refused to extend it to him. So, too, if a carrier offers an unlawful advantage to a shipper who declines it, clearly the carrier may be indicted and punished.

The fact that the concessions offered by the Union Pacific were to be given in the name of the City is immaterial; the statutory prohibition against offers of concessions is not limited to offers made

by a carrier, much less to offers made by a carrier of concessions to be given in its own name. In the absence of any compelling reasons for restricting the broad scope of the statutory language, the Act should, of course, be given effect as written.

IV

THE COURT BELOW PROPERLY FRAMED ITS DECREE TO PREVENT FUTURE VIOLATIONS OF THE ELKINS ACT

Appellants' principal attack on the court's decree is premised on the assumption that the court undertook to fix minimum rental rates for the terminal facilities. The specific portion of the decree upon which the argument is based is the provision enjoining appellants from allowing produce dealers to occupy the terminal unless they pay non-discriminatory rentals which are adequate to "yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation" (R. 379). This provision was responsive to the court's findings and conclusion that appellants were violating the Interstate Commerce Act and the Elkins Act by offering free and reduced rents to the defendant produce dealers.

From the preceding discussion in this brief it is apparent that the findings and conclusion are sustained by both the record and the law. Accordingly, the court "was bound to frame its decree so

as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; see also *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507; *Local 167* v. *United States*, 291 U. S. 293; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526.

Despite the intricate and tenuous arguments advanced by appellants, the court did not purport to fix minimum rentals. It did make findings as to the value of the terminal properties and the probable yield if the standard rentals which the City had fixed for the future were collected. These findings were made on the extensive evidence offered by the Government to prove that even the standard rentals would amount to concessions. After making the findings the court concluded that the standard rental rates, if collected, would *not* result in concessions (Fdg. 42, R. 365).

In its opinions the court expressly noted that it had considered the evidence solely for the purpose of determining the sufficiency of the standard rentals, that it had no power to fix minimum rentals, and that "the rate of return for the future will not be determined in this action" (Ops., R. 337, 377). In view of the court's own interpretation of its purpose, expressed at the time the findings and conclusions were entered (R. 336) and again, after further argument, at the time the decree was filed (R. 376), the decree must be read as simply enjoin-

ing the future giving of concessions by means of charging insufficient rentals for terminal space. Proof that appellants had previously held out rental concessions in a variety of forms as inducements to dealers amply justified that injunction. Cf. *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507; *Merchants Warehouse Co.* v. *United States* 283 U. S. 501; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361. It is well settled that the power of the federal courts to enjoin illegal activities extends to related unlawful acts and that the injunction may prohibit not only acts of the same character as those committed in the past but also acts whose commission may fairly be anticipated in the future. *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, present Term, decided March 3, 1941.

The necessity of the provisions of the decree prohibiting the charging of insufficient rentals in the future is amply shown by the conduct of appellants during this very litigation. At the outset of the suit the court granted a temporary restraining order couched in general terms prohibiting the giving of free rentals and other valuable considerations to the defendant produce dealers (R. 93–97). Appellants ignored both the letter and the spirit of this prohibition. Although most of the defendant produce dealers were occupying space at the terminal, no rent whatever was collected for more than two months after the entry of the restraining order

(R. 690, 951). Consequently, the court in its temporary injunction provided that the standard rates of rental should be charged and collected except that proportionate rent should be assessed on quarters not fully completed (R. 288–291). Soon afterwards Stanley of Union Pacific told a meeting of the tenants of the market that engineers would make a survey regarding the completion of the units and that this would result in lower rentals (R. 1286–1287). The plain inference is that the Union Pacific was still engaged in devising schemes by which it and the City could evade the letter of the law.

Appellants profess great indignation at what they construe to be an unlawful interference by the court below with powers, rights and duties vested in the City by state law. Nothing could be plainer than that the state, in authorizing the City to engage in a proprietary enterprise (*State ex rel. Parker* v. *Kansas City,* 151 Kans. 1, 151 Kans. 2), did not immunize the City from the applicable provisions of federal law. Cf. *Houston & Texas Ry.* v. *United States,* 234 U. S. 342. A municipal corporation stands on the same footing as every other person or corporation when it engages in activities which contravene federal statutes regulating interstate commerce. *United States* v. *California,* 297 U. S. 175.

The sole concern of the court below was the prevention of any further grant of concessions in the form of free or inadequate rentals to produce deal-

ers. If it is illegal for the City alone to give such concessions, it was certainly proper to enter an injunction which would effectively end the practice. And the injunction was equally proper if the illegality of the concessions lies in the participation of Union Pacific with the City in making the concessions. The scheme originated and executed by Union Pacific to circumvent the Elkins Act resulted, by its very nature, in inextricably tying together the interests and activities of Union Pacific and of the City. Certainly the court below was not required to disentangle the parties from a relationship which they themselves had voluntarily created. It properly chose instead to strike directly at the practice which it had found to be illegal under existing circumstances and left the door open for the City to secure such future modification of the decree as subsequent events might warrant (R. 381).

Appellants voice a final protest against the decree on the grounds that the court indicated that the rentals for the market should not only be sufficient to pay out-of-pocket expenses but should represent a fair return on the full value of the property. Appellants contend that in determining whether or not the rentals constitute a fair return, the value of the public levee land and the amount of the P. W. A. grant should be omitted from consideration. The argument is that since these capital items did not cost appellants anything, appel-

lants cannot be held to be giving anything of value to the dealers simply by charging them rentals computed without reference to these items. This branch of appellants' argument apparently assumes that the court's ruling would have been proper if the terminal had been constructed entirely on borrowed capital; the contention is grounded solely on the fact that part of the capital cost of the project was covered by outright grants to the City.

The manner in which the capital was acquired is obviously immaterial to the issue of whether it is a concession to permit a shipper to lease property at rentals disproportionate to the value of the property. Cf. *San Joaquin Co.* v. *Stanislaus County*, 223 U. S. 454. At this point it must be taken as established that appellants stand on the same footing as other parties which the courts have found guilty of giving concessions in violation of the Elkins Act. Certainly a carrier could not defend against such a charge on the ground that it was using a public grant to make the concession. In cases which have involved failure of carriers to collect adequate rentals on land leased to shippers the courts have concerned themselves solely with question of the true rental value of the property. *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849 (C. C. A. 6th); *Central of Georgia Ry. Co.* v. *Blount*, 238 Fed. 292 (C. C. A. 5th).

We submit, therefore, that the court below was entirely correct not only in decreeing that the rent-

als to be charged in the future should be at least large enough to assure that no concessions are given to the dealers and in indicating that, in order not to constitute concessions, the minimum rentals must be such as to provide a fair return upon the full value of the property.

CONCLUSION

The decision of the court below should be affirmed.

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APRIL 1941.

APPENDIX

Section 1 (1) of the Elkins Act (c. 708, 32 Stat. 847; c. 3591, 34 Stat. 587; 49 Stat. 41 (1)) so far as pertinent here provides:

> Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any de-

vice whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *

Section 3 of the Elkins Act (c. 708, 32 Stat. 848; c. 231, 36 Stat. 1167; 49 USC § 43) is as follows:

Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and deter-

mined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. * * * *Provided*, That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Section 2 of the Interstate Commerce Act (c. 104, 24 Stat. 379; c. 91, 41 Stat. 479; 49 U. S. C. § 2) is as follows:

If any common carrier subject to the provisions of this chapter shall, directly or in-

directly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3 (1) of the Interstate Commerce Act (c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; 49 USC 3 (1)) is as follows:

It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 6 (7) of the Interstate Commerce Act (c. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; 49 USC 6 (7)) is as follows:

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the

rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

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